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ADVICE AND DISSENT: DUE PROCESS OF THE SENATE

Luis Kutner*

The Watergate affair demonstrates the need for a general resurgence of the Senate's proper role in the appointive process. In order to understand the true nature and functioning of this theoretical check on the exercise of unlimited Executive appointment power, the author proceeds through an analysis of the Senate confirmation process. Through a concurrent study of the Senate's constitutionally prescribed function of advice and consent and the historical precedent for Senatorial scrutiny in the appointive process, the author graphically describes the scope of this Senatorial power. Further, the author attempts to place the exercise of the power in perspective, suggesting that it is relative to the nature of the position sought, and to the nature of the branch of government to be served. In arguing for stricter scrutiny, the author places the Senatorial responsibility for confirmation of Executive appointments on a continuum—the presumption in favor of Executive choice is greater when the appointment involves the Executive branch, to be reduced proportionally when the position is either quasi-legislative or judicial.

But as the clerk moved slowly and deliberately on, through the rest of the A's, John Baker of Kentucky and the B's on through the C's and the two D's—"Yes," said Stanley Danta quietly, and "No," said John DeWilton loudly after—the E's and the lone F, Hal Fry, who said "No!" emphatically, on down the alphabet to the M's and O's and P's and Arly Richardson, whose "Yes!" came with a certain spiteful air, it was obvious that nothing could stem the tide. The press gallery began to stir with a great restlessness, and long before the clerk came at last to "Mr. Wilson!" and the tension suddenly burst in a roar of excitement, the wire-service reporters were already long gone with their FLASH. SENATE DEFEATS LEFFINGWELL.


INTRODUCTION

A CURIOUS kind of drama was played out when, on December 17th, 1973, William B. Saxbe was confirmed as Richard Nixon's fourth Attorney General—a drama for which the script was written two hundred years ago. The seeming rancor and friction between the Senate and the President obscures the fact that

* Member, Illinois and Indiana Bar. The author gratefully acknowledges the editorial assistance of Stanley Griffith, a member of the DePaul Law Review Staff.
the Senate has not stood in the way of the President's appointments very often. In the first nine months of 1973, approximately 42,000 names of prospective appointees were sent to the Senate for confirmation and most received rubber stamp approval. In the first year of President Nixon's administration, he made 73,759 appointments (all but 4,633 were military) and every one of these was approved with little or no controversy. As a matter of fact, the only significant setbacks the President has suffered were with respect to the appointments of Clement F. Haynesworth, Jr. and G. Harrold Carswell to the Supreme Court, George M. Godley to the office of Undersecretary of State, Robert F. Morris to the Federal Power Commission (a vote to recommit on the floor of the Senate), and L. Patrick Gray, III, to the office of Executive Director of the Federal Bureau of Investigation (nomination withdrawn after severe questioning in the Senate Judiciary Committee). In short, the President has had relatively little difficulty securing Senate approval of his choices for judicial, administrative, and regulatory offices.¹ This article will examine the legal, political, and constitutional processes which bear upon the President's power of appointment. Concurrently, the Senate confirmation process will be evaluated, with a view towards understanding the true nature and function of this theoretical check on the exercise of unlimited executive appointment power.

There is no question that the Senate has the power, the right and, indeed, the duty to reject a nominee offered by the President in proper cases. Article II, section 2, of the Constitution states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."²

While presidential appointments of "officers" are generally un-

². This includes offices in the Cabinet and independent agencies, which are established by law. What constitutes an "officer" within the meaning of article II, section 2, preoccupied some of the early decisions, but generally it encompasses a position in government with duration, tenure, emolument, and duties. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867).
lawful and without effect unless subjected to the Senate's power of advice and consent, Congress may vest the power of appointment of such an "officer" solely in the President, a department head, or the courts. Conversely, Congress may, through passage of legislation subject any executive officer to its power of advice and consent.

The power of the Senate to confirm officers nominated by the President is an important element in a government based on the separation of powers. In his study of the Senate, Lindsay Rogers has noted that "if the Senate did not have the right to advice and consent, . . . the executive's own resource would be too great," adding that "senatorial confirmation of appointments, though it divides responsibility, is probably a valuable check." However,


Congress may vest the power of appointment of an "officer" solely in the President, a department head, or the courts. Ex parte Siebold, 100 U.S. 371 (1880); Williams v. Phillips, 360 F. Supp. 1363, 1367-68 (D.D.C. 1973); Collins' Case, 14 Ct. Cl. 568 (1878).

4. Recent efforts on the part of Congress to reassert its authority over the Office of Management and Budget illustrate that a determined President may thwart Congressional efforts by vetoing the legislation designed to accomplish this goal. The House of Representatives passed a bill to abolish the present OMB directorship and deputy directorship and to create two identical posts requiring Senatorial confirmation on May 1, 1973. N.Y. Times, May 2, 1973, at 13, col. 1. The Senate substituted the House version for its own (passed in early February) on May 3. N.Y. Times, May 5, 1973, at 21, col. 4. There is little doubt that the Congress was motivated by presidential impoundment of funds and by the central role in these decisions played by OMB. Further, the effort had been branded an "axe Ash" drive because the incumbent director Roy L. Ash would be forced to go before the Senate if he was to remain in office. President Nixon vetoed the bill on May 18 and referred to the legislation as a "backdoor" assault on presidential authority. He said it "... would be a grave violation of the fundamental doctrine of separation of powers . . ." and that these positions "... cannot reasonably be equated with Cabinet and sub-Cabinet posts for which confirmation is appropriate. . . ." N.Y. Times, May 19, 1973, at 1, col. 4. On May 22 the Senate voted to override, 62-22; but the next day the House vote fell forty votes shy, 236-178. N.Y. Times, May 24, 1973, at 1, col. 4. On June 13, 1973, an effort to append the OMB confirmation bill (H.R. 3932) to an extension of the debt ceiling failed for procedural reasons. 119 Cong. Rec. H4652-60 (daily ed. June 13, 1973). Thus the power of Congress to subject an office to its advice and consent power may be subject to presidential veto.

5. L. Rogers, The American Senate 27 (1926) [hereinafter cited as Rogers].

6. Id. at 250.
Thomas Jefferson, writing to Samuel Kercheval in 1816, advanced the following argument:

Nomination to office is an executive function. To give it to the legislature as we do, is a violation of the principle of separation of powers. It swerves the members from correctness, by temptations to intrigue for office themselves, and to a corrupt barter for votes, and destroys the responsibility by dividing it among a multitude. By leaving nomination in its proper place, among executive functions, the principle of the distribution of powers is preserved and responsibility weighs with its heaviest force on a single head.7

While the separation of powers doctrine certainly requires that the executive and the legislature be independent of one another, the Constitution prescribes that in certain matters both branches shall cooperate. The Constitution deliberately delegates a portion of the executive power of appointment to the Senate. These executive powers assigned to the Senate in the appointment process are described in article II, which deals with Presidential powers, rather than in article I, which enumerates the powers of Congress.8 In an analogous way, the Constitution makes the President a part of the legislative arm of government by conferring on him a veto power over legislation passed by Congress. Thus, the Senate’s “negative on appointments” is similar to the President’s veto on legislation.9 As Charles L. Black, Jr., of Yale Law School, has stated, “[n]othing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than a duty rests on the President to sign bills he thinks unwise.”10 If the Senate cannot refuse to confirm officers, then the President cannot veto a bill. It is as simple as that.

The Senate’s advice and consent power serves other valuable functions. Exercise of the power provides an opportunity for legislative scrutiny of executive actions and policy.11 Questions may be

7. 15 WRITINGS OF THOMAS JEFFERSON 37 (E.A. Bergh ed. 1907).
8. D. BERMAN, IN CONGRESS ASSEMBLED 361 (1964) [hereinafter cited as BERMAN].
11. An example of such scrutiny is provided by the following testimony of February 22, 1972, in an exchange between Senator Birch Bayh and Attorney General designate, Richard G. Kleindienst:
posed to a prospective officeholder regarding possible legislative changes. Participation of the Senate may also provide some measure of executive accountability. Furthermore, Senators may individually or collectively use the advice and consent power to cast symbolic votes, intended as expressions of protest against policies or as a form of censure. More recently the advice and consent

Bayh: Do you believe the attorney general has the power to order electronic surveillance without a court order?
Bayh: Is there a distinction between foreign and domestic threats to national security?
Kleindienst: No. Under domestic threats, we are talking about subversives, not people with differing ideologies.
Bayh: Regardless, what is wrong with getting a neutral person (a court) to issue a warrant for the surveillance?
Kleindienst: Judges do not have the knowledge to make decisions on when national security is endangered. Only the President has . . . Questioning continued on subjects ranging from capital punishment to enforcement of the 1965 Voting Rights Act. 30 CONG. Q. 452-53 (1972). \textit{See also Hearings before the Committee on the Judiciary on the Nomination of Louis Patrick Gray III to Be Director, Federal Bureau of Investigation, Exec. Rept. 91-331} [hereinafter cited GRAY HEARINGS] for a detailed statement of the nominee on the operation of the FBI.

12. \textit{See}, e.g., GRAY HEARINGS, \textit{supra} note 12, at 262-69. As a result of the hearings on William E. Colby to head the Central Intelligence Agency, John C. Stennis announced a full-scale review of the laws governing the CIA, and Stuart Symington stated that the Security Act of 1947 which created the Agency contained “little loopholes” which permitted the Agency to supervise a secret war in Laos and to engage in other unauthorized clandestine activities. N.Y. Times, July 21, 1973, at 3, col. 1.

13. The recent confirmation hearings on the nomination of Dr. Henry Kissinger to be Secretary of State forced the nominee to respond to questions regarding his role in placing telephone taps on the phones of seventeen persons. Stuart Symington grilled Dr. Kissinger on his role as advisor to the President and the decision to conduct secret bombing raids into Cambodia and to falsify records sent to the Senate. The Senators quizzed him on his future dual role as both a Cabinet officer and presidential advisor and seemed satisfied with the answer that he would not invoke the privilege attending the latter position to avoid answering to Congress in his capacity as a Cabinet officer. N.Y. Times, Sept. 8, 1973, at 1, col. 5.

14. Senator Fred R. Harris announced his vote against Richard Kleindienst would be to protest the Justice Department’s handling of antitrust matters which he believed had caused “an inordinate concentration of economic power.” 30 CONG. Q. 1370 (1972). Harris cast the lone “nay” vote on Lewis F. Powell’s nomination to the Supreme Court on the grounds that he believed Powell to be an “elitist,” without
power has been utilized as a device to wrest power and concessions from the President. These ancillary considerations may weigh just as heavily in a decision to confirm or reject as the nominee's fitness for office.

The constitutional provision requiring that all officers be appointed with the advice and consent of the Senate demands more than a mere Senate vote to confirm or reject; it requires that the Senate, which shares in the appointment power, be consulted by the President before a nomination is made. Because the Constitution im-

regard for the little man. 29 CONG. Q. 2532 (1971).

The Senate Foreign Relations Committee voted on July 11, 1973, to "indefinitely postpone" the vote on G. McMurtrie Godley and to ask that Secretary of State William Rogers give Godley a post unrelated to Southeast Asia. Godley, nominated to be Undersecretary of State for East Asian Affairs, had been Ambassador to Laos and had participated in the implementation of the administration's policy there. Committee Chairman J. William Fulbright said the Committee did not doubt Godley's qualifications but rejected him because of his identification with policies which had been "an unmitigated failure." It was admitted at the hearings that Godley had assisted in the selection of bombing targets in Laos and had advised the use of the CIA to command a clandestine army there. A similar protest over William H. Sullivan to be Ambassador to the Philippines failed to secure more than three votes. N.Y. Times, July 12, 1973, at 1, col. 5.

The nomination of Peter Brennan as Secretary of Labor, Elliot Richardson as Secretary of Defense, William P. Clements, Jr. as Deputy Secretary of Defense, James P. Schlessinger as Director of the Central Intelligence Agency, Casper Weinberger as Secretary of Health Education and Welfare, and James P. Schlessinger as Director of the Central Intelligence Agency, Casper Weinberger as Secretary of Health Education and Welfare, and James T. Lynn as Secretary of Housing and Urban Development were held up by the Democratic caucus in protest over the Nixon administration's Vietnam War policies. This maneuver in the Senate, majority leader Mike Mansfield explained, was not seen as a move to extort a change in policy but rather as a symbolic act of protest. N.Y. Times, Jan. 17, 1973, at 2, col. 3; N.Y. Times, Jan. 19, 1973, at 4, col. 1.

15. Senator James E. Abourezk urged the Senate to withhold approval of all presidential nominees and to cut off funds for White House staff to attempt to re-capture authority from the President. He accused the President of exceeding his powers in the conduct of the war in Vietnam and in impounding money appropriated by Congress. "The Constitution gives us two ultimate weapons, the power of the purse and the right to advise and consent on appointments. We must now make full use of both." 119 CONG. REC. 5621-23 (daily ed. Jan. 16, 1973) (remarks of Senator Abourezk).

Although there has generally not been much sentiment for going so far, the confirmation of Elliot Richardson as Attorney General was preconditioned on his appointment of a "Watergate special prosecutor," despite the fact that Richardson had already been confirmed three times in four years. N.Y. Times, May 3, 1973, at 6, col. 3.

16. J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 12-13 (1953) [hereinafter cited as HARRIS]. The tradition of consulting with the Senate dates to the appointment of Benjamin Fishbourn by George Washington. Fishbourn was to be in charge of naval operations in Savannah, Georgia. However, the two Senators from Georgia had other candidates in mind, and their efforts led both to the first
poses upon the Senate the function of passing on appointments, it is not only a Senator’s right, it is his solemn duty under the Constitution to pass on the qualifications of all those appointed to office. Charles Black, an advocate of a strong senatorial role in the appointment process, argues:

In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty. . . . He who merely consents might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who advises gives or withholds his advice on the basis of all the relevant considerations bearing on decision.17

The advice of the Senate is involved here—and no Senator should confirm an individual unless willing to appoint them.

CONSTITUTIONAL BACKGROUND

According to Charles S. Hyneman, it was the intent of the founding fathers to give the Senate “full participation in the political process of choosing men for public office,” or else they would have so worded the Constitution to indicate that the Senate could only approve or disapprove.18 The framers of the Constitution indeed intended that the Senate exercise an important role in the appointment power and that its function should not be nominal or perfunctory.

The power of advice and consent to appointments was granted to the Senate by article II, section 2, of the Constitution, as a check on executive power. There was strong objection, particularly in the smaller states, to vesting this power in the President alone, for it was assumed he would come from the more populous states. The debates in the Constitutional Convention of 1787 indicated a strong body of opinion which feared that if the President were given the sole power to make appointments, it would lead to monarchy.19 The debate rated between those who favored a strong central govern-

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17. Black, supra note 10, at 658-59 (emphasis in original).
ment and those who feared it.\textsuperscript{20} It was argued that the "safe course" was to center the appointment power in the Senate. This view was opposed by men, like Alexander Hamilton, who advocated strong executive power. They wished to avoid a repetition of the abuses they had observed under the Articles of Confederation when the State legislatures alone had the power to appoint.\textsuperscript{21}

The founders, in their effort to create a nation, engaged in a constant process of compromise which led them finally to adopt a compromise, giving both the President and the Senate a share in the appointment power. This compromise established a safeguard against unfit executive appointments by providing for a three-step appointment process in which the Senate played a key role:\textsuperscript{22} First, nominations were to be made by the President. Second, the "assent" of the Senate was called for. Finally, there was the appointment and commissioning of the appointee by the President.

Gouverneur Morris, who had previously favored appointment solely by the executive, supported the compromise provision in these words: "As the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security . . . ." Roger Sherman and Oliver Ellsworth who reported to the Governor of Connecticut on this compromise between the large

\textsuperscript{20} See Harris, supra note 16, at 17-35 and debates cited therein for more detailed history of the art. II, section 2, compromise. Benjamin Franklin warned, "No new appointments would be suffered as heretofore in Pennsylvania unless it be referred to the Executive; so that all the profitable ones will be at his disposal. The first man put at the helm will be a good one. Nobody knows what sort may come afterwards. The Executive will always be increasing, here as elsewhere, till it ends in Monarchy." John Rutledge stated that he was "by no means disposed to grant so great a power to any single person. The people will think we are leaning too much toward Monarchy." And George Mason declared:

\textsuperscript{21} Id. at 22. Roger Sherman maintained that the Senate would provide better security for proper choice, saying, "It would be composed of men nearly equal to the Executive, and would of course have more wisdom. They would bring into their deliberations a more diffuse knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate." Id. at 28.

\textsuperscript{22} Id.
and small states, indicated that “[t]he equal representation of the States in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as the greater States.”23 Alexander Hamilton, stated in The Federalist Papers that it was the intention of the founders to restrain the President’s power to dispose honors and emoluments:

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view of popularity. . . . It will be readily comprehended, that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature.24

Hamilton, however, did not feel that the Senate would have great influence over nominations and appointments. In Number 66 of The Federalist he wrote, “[t]here will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive and oblige him to make another; but they cannot themselves choose—they can only ratify or reject the choice [of the President] . . . .”25 It did not take long for history to prove Hamilton wrong. The Senate at once demanded that President Washington consult with them before making a nomination. In fact, this is what the Constitution had actually contemplated. Senatorial confirmation, as Joseph P. Harris concludes in his book Advice and Consent of the Senate, “has provided the kind of protection against bad appointments which the framers anticipated.”26

The power of the Congress to advise and consent to appointments has been narrowly construed and will not be extended by implication to include the power of Congress to require by statute that it be consulted when an officer is removed. In other words, arti-


26. HARRIS, supra note 16.
Article I, section 1 is a broad grant of executive power to the President. Neither the impeachment power of article I, section 3, clause 7, read in combination with article II, section 4 (the impeachment clause), nor article II, section 2 alone, will be read to intrude on the President's power to remove civil officers. Article II, section 2, will be read narrowly; and article II, section 4, will be construed as a grant of concurrent power. The power to remove is incidental to the power to appoint. But Congress may delimit the Pres-

27. Meyers v. United States, 272 U.S. 52 (1926). U.S. Const. art. I, § 3, para. 7 "The Senate shall have the sole power to try impeachments..." and para. 8 "Judgment in Cases of Impeachment shall not extend further than to removal from office. . . ."
U.S. Const. art. II, § 4: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors." But see the debates of the founding fathers regarding abuse of the removal power by a President quoted in In re Hennen, 38 U.S. (13 Pet.) 230, 239-42 (1839):

Mr. Lawrence . . . "If the president abuses his trust, will he escape the popular censure? And would he not be liable to impeachment for displacing a worthy and able man, who enjoyed the confidence of the people."
Mr. Madison . . . "The danger then consists merely in this, that the president can displace from office a man whose merits require that he should be continued in it . . . and [what are] the restraints that operate to prevent it? In the first place, he will be impeachable by the house, for such an act of mal-administration; for I contend, that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust." Not one gentleman who participated in the debate dissented from these views. We hold this to be sound constitutional doctrine. To assert the contrary, is to confound power with right, and involves the absurdity of making every exercise of power a rightful and lawful exercise.

38 U.S. at 240. Similarly, the Court went on to say that if the President abused the veto power, he would be liable for impeachment. Likewise if he sold political favors.

[T]he act then does not depend exclusively for its legality merely upon the fact that it is within the power which the party possesses. An abuse of legal authority is illegal, an abuse of constitutional power a high misdemeanor. In the opinion of some of the most eminent men our country has produced, the very act which is the subject of our present consideration constitutes an impeachable offense. . . .

Fortified in our positions by this array of authority, [Lord Coke, Chancellor Kent, Judge Story] we have felt no hesitation in asserting that the act of removal attempted to be exercised in this case, is a clear abuse of power, if the authority indeed exists; is a palpable violation of duty, and subjects the offending party to impeachment, as for a high misdemeanor.

38 U.S. at 341. The Court went on to hold that the defendant judge in this case was not amenable to mandamus in view of the fact that the appropriate remedy was impeachment.

ident's removal power in cases where full independence from the executive authority is the essence of the office and the regulatory officer exercises quasi-judicial power. Congress may constitutionally restrict, by way of statute, the executive's choice of nominees by imposing explicit qualifications, such as limiting the choice to persons of a race, sex, occupation, or even to a list suggested by Congress or some other group.

The appointment need not be by the President, head of department, or by the courts, if the duties of a nominee are but occasional and temporary. Otherwise, all appointments must be by advice and consent or vested by law with the President, a department head or with the courts. Furthermore, Congress may constitutionally prescribe a method of filling vacancies temporarily until such time as the President shall nominate a successor. However, if Congress does not make any statutory provision for temporary succession, the Constitution compels the President to submit the officer's appointment to the Senate.

A final word about a curious extra-constitutional feature of the appointment process is worthy of note. Although article II, section 2 makes no provision regarding the role of the House of Representatives, it is not uncommon for members of the House to express their opinions on nominees, to petition the Senate regarding their qualifications, and to testify with respect to the advisability of appointments. An even more curious situation is reflected in

30. For a complete list of the types of restrictions which may be imposed by Congress on the appointing power, see Meyers v. United States, 272 U.S. 52, 265-74 (Brandeis, J., dissenting).
31. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). During World War II, Franklin Roosevelt created the National War Labor Board which seemingly exercised considerable authority over labor-management relations questions. Yet it was held that such a non-statutory agency was for the sole purpose of advising the President and heads of departments in formulation of enforceable orders, hence not an office within the meaning of article II, section 2. Employers Group of Motor Freight Carriers v. National War Labor Bd., 143 F.2d 145 (D.C. Cir. 1944).
33. A recent example of this was seen with the appointment of Judge G. Harrold Carswell. The efforts of several blocs of representatives figured prominently in
the unwritten code of congressional courtesy, which provides that
the Senate shall defer to the House Subcommittee on Internal
Security, which in turn holds hearings on all matters related to
loyalty and security. This practice was more common in the hey-
day of McCarthyism, but a recent example of the importance of this
aspect of the appointment process was provided by the successful
efforts of Representative John Ashbrook to delay the appointment of
Helmut Sonnenfeldt to the office of Undersecretary of the Treas-
ury. It is apparent that the undefined interstices of the process
are frequently as important as those aspects of the process which
are incorporated into written form.

The constitutional matrix which the appointment process operates
is a delicate one combining politics, law, and custom. The remain-
der of this article will examine the ways in which the constitutional
drama is played out.

HISTORIC ROLE OF THE SENATE IN SALIENT CASES

Cabinet Officers

Regarding the question of the latitude the President should
have in making nominations to important offices, the custom
has become well established that the President has the right to select
the members of his cabinet—and that the Senate will not interfere
even though it may be of the opposition party. "Although the Senate
takes very seriously its responsibility for screening nomi-

building sentiment for his defeat. Particularly vocal was a group of Black Congress-
men headed by John Conyers, Jr. 29 Cong. Q. 905-08.

34. John Ashbrook, a conservative opponent of the Nixon-Kissinger détente
policy, successfully blocked Sonnenfeldt's appointment by announcing his intention
to investigate Sonnenfeldt's background. Ashbrook's chief assistant in the
enterprise was a fellow by the name of Otto Otepka a former protégé of the
late Joseph McCarthy. Otepka's charge was that Sonnenfeldt had leaked classified in-
formation to the press as long ago as 1954. Although the Senate Finance Committee
was nominally in charge of the hearings, Ashbrook's committee was permitted to
insist on extensive hearings of its own. All this, despite the fact that Richard
Nixon and Dr. Kissinger felt the appointment to be crucial to the establishment
of liaison between the National Security Council (for which Sonnenfeldt had worked
as an advisor to Kissinger) and the Treasury Department which would figure prom-
ominently in trade and monetary negotiations with the Soviets, the People's Republic
of China and Europe. No visible Senate opposition presented itself, but the unwrit-

35. Rogers, supra note 5, at 29.
nees to the most important Federal offices,” Daniel Berman points out, “it is a rarity for confirmation to be withheld from one who has been named to a Cabinet position.”

Typically, nominations to the President’s cabinet have been confirmed without much hesitation. The Senate, out of courtesy to the President, has not been disposed to be very critical of a presidential appointment to a cabinet position. Senator Fessenden spoke of senatorial courtesy in these words:

The general idea of the Senate has been, whether they liked the men or not, to confirm them without any difficulty, because in executing the great and varied interests of this great country it is exceedingly important that there should be the utmost harmony between those who are charged with that execution.

Senator Guy Gillette of Iowa also expressed the general attitude of the Senate toward cabinet nominations when he said in 1939, “[o]ne of the last men on earth I would want in my cabinet is Harry Hopkins. However, the President wants him. He is entitled to him . . . . I shall vote for the confirmation of Harry Hopkins . . . .”

The President, as a rule, should feel free to select members of his “official family” on the basis of whatever criteria he wishes; cabinet members have been described as “extensions of the President.” Members of the President’s cabinet are his own personal advisers and are closely associated with him. The heads of the departments are responsible to the executive; and, in turn, the President is held accountable for what they do. Berman claims that “the Chief Executive’s unqualified power of removal is an index of the absolute trust and confidence that should characterize the relationship.”

The criteria for removal from office in no way relate to the criteria for confirming appointments. While Congress has no power to remove a cabinet officer except by impeaching him and convicting him of “Treason, Bribery, or other High Crimes and Misdeme-

36. Berman, supra note 8, at 362.
37. Haynes, supra note 9, at 761. But see notes 13-15 supra.
38. Haynes, supra note 9, at 761.
41. See Berman, supra note 8, at 362.
meanors” (article II, section 4), nothing in the Constitution implies that the reasons for removal shall apply or have any relation to the reasons for refusing to confirm. The logic of the argument would be that the Senate could never exercise its right to refuse to confirm unless the appointee were guilty of treason, bribery or other high crimes and misdemeanors.\(^4\)

Although Sidney Hyman states that unless a President is given the freedom to choose a cabinet of his own preference, he is denied “a definite center of responsibility for what issues from the Executive,” he concludes that it does not follow that every cabinet nomination should be automatically confirmed. Hyman insists that the phrase “with advice and consent” does not mean that the Senate has a passive role in the confirmation process:

> It does not imply that its work is done when it goes through the ceremonial motions of a formal hearing, and that it must then concur in the President's choice. Rather, the Senate has an active role to perform throughout. And the knowledge that it has that role and stands ready at all times to perform it is in itself an inducement for the President to choose “qualified” men...\(^4\)

There is no doubt that the Senate has the power to refuse to confirm a cabinet official. There have been a number of instances when the Senate has “kicked up its heels” and rejected a cabinet appointment. The first such instance occurred in 1834, when the Senate refused to confirm President Jackson’s nominee, Roger B. Taney, as Secretary of the Treasury. A more recent example is the rejection of Lewis L. Strauss’ nomination to the office of Secretary of Commerce.\(^4\) Thus, there is historical precedent for senatorial scrutiny and rejection of cabinet nominees.

President Calvin Coolidge’s nomination of Charles B. Warren to the office of Attorney General in 1925 is frequently cited as a most significant case involving strict senatorial scrutiny and rejection of a cabinet nominee. Mr. Warren was the head of a prominent Detroit law firm and president of the Michigan Sugar Company. He had previously served as United States Ambassador to Japan and Mexico.\(^4\) No cabinet nomination had been rejected by the Senate since

\(^4\) See notes 27-30 and accompanying text, supra.
\(^4\) Hyman, supra note 19, at 28-30.
\(^4\) See Berman, supra note 8, at 362.
\(^4\) Harris, supra note 16, at 260.
1868, and the New York Times predicted that "Mr. Warren's nomination would be confirmed by a considerable majority after the opposing senators have recorded their protests." But, two days later, a majority of the Senate opposed the confirmation of Warren by a vote of 41 to 38.46

The "gravamen of the objection" to Warren was that he had been closely associated with the American Sugar Refining Company, which had been charged by the Federal Trade Commission with violations of the antitrust laws. The Senate feared that the Sherman Act would not be vigorously enforced if Warren were confirmed. Senator Walsh of Montana opened the debate on the floor of the Senate, as follows:

I subscribe to the doctrine that under all ordinary circumstances the nominations of the President of the United States for members of the Cabinet should be confirmed by the Senate without delay and that opposition of a political or factional character ought to be discountenanced. The President is charged . . . to take care that all the laws be faithfully executed, and he ought to be given the greatest liberty possible in the selection of those who immediately under him are to carry out his policies. . . . Nevertheless . . . the framers of our Constitution . . . provided that . . . [t]he responsibility . . . for the appointment of all Federal officers where confirmation is necessary rests upon this body jointly with the President of the United States. . . . It is indisputable that we share that responsibility and that we must assume it. . . .47

Walsh continued by saying that "a man may have led the most exemplary life and yet be totally unfit for the duties and responsibility of high official position."48 Walsh then raised the objection that Warren "ought not be made Attorney General . . . because for years he was a representative . . . of the Sugar Trust, one of the most offensive and oppressive trusts with which the American people have unfortunately been familiar in the present and past generations,"49 and concluded his remarks with the assertion that if the nomination were confirmed, Congress should repeal the Sherman Antitrust Act.50 Senator Reed claimed, "Those of you who propose to stand here to-day and uphold the hands of this trust

46. Id. at 119-20.
47. 67 CONG. REC. 18 (1925).
48. Id.
50. 67 CONG. REC. 32 (1925).
organizer, this trust promoter, this trust conspirator, thinking you are doing a service to wealth, are in the end doing it a disservice . . . ."  

Indeed, the Senator went considerably further:

An insidious argument has been whispered around this Chamber . . . that the Senate has no responsibility; that we should say to the President: "This is your office. Do with it as you please. Handle it as you might your own private property, and then in the end we will hold you responsible."

A farser doctrine was never promulgated. It is false in fact, false in theory, false in its logic, and infamous to a degree that can scarcely be portrayed.

. . . .

There is no such thing as a presidential Cabinet. That is a mere name, a figure of speech. . . .

Following the unexpected rejection of Warren, President Coolidge renominated him. In issuing a statement, Coolidge expressed the hope "that the unbroken practice of three generations of permitting the President to choose his own Cabinet will not now be changed and that the opposition to Mr. Warren, upon further consideration, will be withdrawn in order that the country may have the benefit of his excellent qualities and the President may be unhamed in choosing his own methods of executing the laws."

However, the Senate disregarded the plea and again rejected Warren. "That the President should be unhamed is, generally speaking sound doctrine," according to Lindsay Rogers who at the same time recognized that "the Senate has a responsibility which it cannot avoid. Whether the standard set up in the Warren case was extreme or no[t] is beside the point; if the Senate believes that a nominee is unfit it should interfere; a reasonable presidential discretion should not be presidential license." The Senate has a primary obligation to judge every facet of a nominee—his character, integrity, emotional stability, competence, and whether he has any conflicts of interests—in order to determine if he is qualified to

51. 67 Cong. Rec. 94 (1925).
52. Id.
54. N.Y. Times, March 15, 1925, at 1, col. 7.
55. Harris, supra note 16, at 124.
56. Rogers, supra note 5, at 31.
be entrusted with a cabinet office.\(^{57}\) A Senator is justified in voting against any nominee unless he regards that nominee as the best-qualified person in the country for the job.\(^{58}\)

The concern for even-handed administration of justice evidenced in the Warren confirmation fight has resurfaced recently in the context of nominations to such sensitive positions as the office of Attorney General and the Director of the FBI. Due to an increasing awareness of incursions on civil liberties, there is a growing recognition of the dangerous potential for abuse of power. In the hearings on the nominations of Richard Kleindienst to the office of Attorney General,\(^{59}\) L. Patrick Gray, III, to the office of Director of the FBI,\(^{60}\) Clarence Kelley to the same post,\(^{61}\) and Elliot Richardson...
to the office of Attorney General, the questioning of the nominees has focused heavily on their views in the area of civil liberties and on their political neutrality.

What this represents is not an intrusion of the Senate on the prerogatives of the executive, but rather a regeneration of the historic responsibility of the Senate to check the appointment power of the President. The skepticism born of the troubled times of Watergate and post-Vietnam War is encouraging. The presumption running in favor of presidential nominees appears to be waning in favor of a policy of requiring real and substantive evidence that the appointee is worthy of the public must have in their governmental officials.

**Ambassadors**

The Senate has shown its restraint in not attempting to wrest control of the selection of ambassadors from the hands of the executive. Here, too, the situation is clearly a matter of custom and decorous procedure, based on the rationale that any President has the right to pick envoys to foreign powers, as they are essentially his personal representatives in the nations to which they are assigned.

ence Kelley stated that "he never bowed to political pressure and I don't intend to start." He was questioned regarding surveillance of persons not accused of crimes. Kelley agreed with Committee suggestions that it might be wise to have a "watchdog" committee of Congress to act as a check of FBI activities and said he was not flatly opposed to submission of a line item budget. Both suggestions were strenuously resisted by Kelley's predecessors. Senator Edward Kennedy quizzed Kelley on how he would respond to requests to make campaign speeches, requests to supply data to the White House staff, and to destroy documents "described as 'political dynamite.'" All these questions reflected Senatorial fears that Kelley might permit partisan political considerations to affect the administration of the Bureau. N.Y. Times, June 20, 1973, at 26, col. 6. The Senate was obviously convinced by Kelley's answers because on June 26 after unanimous Judiciary Committee approval, the Senate voted 96 to 0 to confirm. N.Y. Times, June 27, 1973, at 32, col. 3.

62. Despite the fact that Elliot Richardson had been confirmed on three separate occasions to other posts within the Nixon cabinet within the preceeding four years, Senator John V. Tunney spearheaded a successful drive to block the nomination of Richardson to head the Justice Department until he and the President acceded to Senate pressure to name a special prosecutor to investigate Watergate-related crimes. Richardson's personal friendship with John Ehrlichman, Charles Colson and other alleged principals in the Watergate scandal were given as the reasons for insisting on a neutral investigative arm. N.Y. Times, May 3, 1973, at 1, col. 6.
President Eisenhower's nomination of Charles E. Bohlen as Ambassador to the Soviet Union in 1953 is a notable exception to the Senate's general policy of restraint. The nomination of Bohlen was debated on and off in the Senate for a month before his final confirmation. On February 27, 1953, Mr. Eisenhower had submitted to the Senate the name of Bohlen, a career Foreign Service Officer, as nominee to the post in Russia. Bohlen, an expert in the Russian language, was also considered in many quarters to be an expert in Russian affairs. In spite of these qualifications, there was strong opposition to his appointment, particularly among members of the President's own party. This opposition stemmed from Bohlen's participation (ostensibly as an interpreter) in the Yalta Conference, and the subsequent denunciation by Republicans in their 1952 campaign platform of the secret political agreements made at Yalta. Called before the Senate Foreign Relations Committee to be questioned by its members, Bohlen refused to repudiate the Yalta Conference agreements. Further, it was announced to the Committee that Secretary of State Dulles had "cleared" Bohlen after having himself reviewed a summary report by the Federal Bureau of Investigation. The report, Dulles stated, "left no doubt of Mr. Bohlen's loyalty and security." Because of allegations that Bohlen's security file contained derogatory information, a number of senators demanded that the FBI files be examined by the senators themselves.

Some of the senators began to organize a movement to refuse confirmation of Bohlen. Senators McCarthy and McCarran charged that Bohlen was a "poor security risk," and Styles Bridges, President pro tempore of the Senate, declared that there would be "formidable" opposition to the appointment. Others argued that Bohlen could be said to symbolize Yalta, since he had, in the words of Senator Hickenlooper, "defended almost in terms of brilliant
diplomatic victory what I consider to be a diplomatic disaster, and he has criticized severely those who have criticized what was done at Yalta."

Robert A. Taft, speaking on behalf of the Administration, in support of the Bohlen appointment, called McCarthy's suggestion that Dulles come before the Committee and be placed under oath "an uncalled for suggestion," asserting that "Mr. Dulles' statement not under oath was just as good as Mr. Dulles' statement under oath, as far as I am concerned." Senator Taft also opposed the suggestion that the Committee call a security officer, R.W. Scott McLeod, who claimed Dulles had "overruled" him in clearing Bohlen. "After all," said Taft, "we have before us a peculiar kind of question with reference to the file . . . gathered by the FBI containing every kind of material with reference to what Mr. X, Mr. Y, and Mr. Z have said." The Senator then proposed the deputation of two members from the Foreign Relations Committee to review the file, for to open all confidential and classified files to the members would be to destroy the FBI. "It is a file which never should be published and put in general circulation," Taft stressed. "Just how far it could go among Senators without becoming a matter of general circulation is a question I cannot answer."

Senator Taft reluctantly agreed to look into the FBI summary of the Bohlen file with Senator Sparkman. He reported to the Senate on March 25 that, after having read through the summary, he would have asked "very strenuously" to see the raw files, or at least of portion of the testimony of the informants, if there were anything in the summary which seemed ambiguous or suggested that something which might have been in the raw files was omitted. But he could not find anything of that nature in the summary; the information seemed to be complete. Insofar as Taft knew, no one had suggested that there was anything in the files which was not fully covered in the summary. Taft pointed out that "[t]he so-called 16 pages of derogatory information relate to entirely separate mat-

70. 99 Cong. Rec. 2388 (1953), as cited in Young, supra note 63, at 207-08.
72. 99 Cong. Rec. 2201-01 (1953), as cited in Harris, supra note 16, at 298.
73. 99 Cong. Rec. 2201 (1953), as cited in White, supra note 65, at 236.
74. White, supra note 65, at 236.
ters." The greater part of the file consisted of statements of political differences with Bohlen on principles of foreign policy; statements from persons who thought he had played a larger part in the Yalta conversations than others; and statements suggesting that he was closer to Acheson than these person would have liked. Although Taft had political disagreements with Bohlen, he had confidence in his morality and reputation.75

Senator Sparkman corroborated the findings concerning the general good character of Bohlen:76 "The opposition to Bohlen was driven down to its irreducible core," William S. White observed. "The opposition found itself . . . powerless to state its case with any practical coherence."77 Bohlen was confirmed by a vote of 74 to 13, with 11 Republican and two Democratic senators voting "No."78

The deference the Senate has shown toward ambassadorial choices of the President has been called into question more recently over the issue of using ambassadorial appointments as "political plums." It has long been a tradition of our political system to appoint ambassadors based on the ambassador's loyal monetary support of the party in power.79 This strange form of "dollar di-

75. 99 Cong. Rec. 2277-78 (1953).
76. 99 Cong. Rec. 2280 (1953), as cited in Harris, supra note 16, at 297. An analogous situation arose during the recent confirmation hearings on Dr. Henry Kissinger's nomination to be Secretary of State. J. William Fulbright led off the questioning in the Senate Foreign Relations Committee and determined that, in response to leaks of confidential information, Kissinger had agreed to procedures designed to determine the source of the leaks. Seventeen persons including four newsmen had "taps" placed on their phones. Kissinger testified as to his later acquired knowledge regarding the procedure for handling the information secured. However, the Justice Department would not agree to bearing the FBI files on the "taps." Senator Clifford Case stated: "I think it is very clear that the committee will not be in the position to act on the nomination until that report has been received." N.Y. Times, Sept. 8, 1973, at 1, col. 5 and at 10, col. 1. A memo prepared by the Justice Department was sent to the Senate Foreign Relations Committee, but when this proved inadequate, a compromise was worked out whereby Senators Case and Sparkman would review the full file and report back to the Committee after complete discussions with Attorney General Richardson, Acting Deputy Attorney General William D. Ruckelshaus, and Kissinger. The compromise cleared the way for confirmation. N.Y. Times, Sept. 12, 1973, at 1, col. 6.
77. White, supra note 65, at 238-39.
78. 99 Cong. Rec. 2392 (1953), as cited in Harris, supra note 16, at 299.
79. Ambassador to France, John N. Irwin, gave $14,000 in 1968, $16,500 in 1970 and $52,500 in 1972. His future was boosted by his brother-in-law's contributions of $49,000 in 1968, $22,000 in 1970 and $300,000 in 1972. John Krehbiel
plomacy” has not been disturbed because both political parties have done it. However, this quaint custom may have seen its demise as the result of the appointment of Ruth I. Farkas to the position of ambassador to Luxemburg on February 27, 1973. In testimony before the Senate Foreign Relations Committee, Mrs. Farkas conceded that she had contributed $300,000 to the re-election campaign. However, what prompted the Senate to delay her confirmation was the fact that $100,000 was contributed after the election and $100,000 was given in January and February—after the Committee to Re-elect the President had announced a five million dollar surplus. Although Mrs. Farkas was ultimately confirmed, the Senate Foreign Relations Committee instructed its staff to draft a policy statement on ambassadorial appointments. Included in that statement would be a $10,000 ceiling on contributions for appointees and a limit of fifteen percent on appointments drawn from noncareer Foreign Service ranks.

Again, a healthy trend may be noted in the Senate’s unwillingness to permit the quaint custom of deference to presidential appointment power to continued unexamined. Ambassadors not only represent the Executive, they represent the entire country and article II, section 2 gave the Senate the right and the duty to share in the appointment process.


80. Franklin Roosevelt appointed Edward (Boss Ed) Flynn of the Bronx as envoy to Australia but it was quietly dropped because it was clear that it would not clear the Senate. Maxwell Gluck was appointed by Dwight Eisenhower to head the mission in Ceylon in recognition of his $20-30,000 contributions to the 1956 campaign; and the Senate confirmed him despite the fact that in testimony before the Senate Foreign Relations Committee, Gluck admitted he could not pronounce Prime Minister S.W.R.D. Bandaranaike’s name and possessed, little knowledge of Asia in general. N.Y. Times, May 24, 1973, at 3, col. 3.


82. N.Y. Times, May 24, 1973, at 3, col. 3.
Independent Agencies

During the last half-century, independent commissions have been created by acts of Congress to regulate the complicated national endeavors of government. Congress has provided, by law, for the type of personnel on each new board, the scope of its power granted to the body, and the manner in which his power is to be exercised. While cabinet and diplomatic officers may be called "servants of the President," the regulatory agencies are "servants of the Congress," because they are created to carry out congressional policy. Although the President should have relative freedom in selecting his cabinet members, this broad executive prerogative should not extend to the selection of officers of independent agencies. These agencies are entirely "independent" in the sense that they are not subordinate to any executive department, and hence have no particular connection with the President. The commissions have quasi-legislative powers, and are responsible to Congress, not the Executive. The members of the commissions make policy under their respective acts, and exercise legislative authority to the same degree they exercise administrative authority. Because the legislative body delegates such legislative power, the Senate should retain control over those persons who are, in fact, its agents in exercising that authority. The appointee should be responsible, and *feel* responsible, to the Senate. In his full account of the Senate's function of advice and consent, Harris examines these commissions' "special relationship to Congress":

The function of the Senate in passing upon the nominations [to independent regulatory commissions] is not limited to the technical qualifications of the nominee and his fitness for the office; it is appropriately concerned with his stand on broad policies and the effect his appointment may have upon the functioning of the commission. Often the character and attitude of the officers who head the agency have as much to do with its policies as the legislation under which it operates. The Senate must therefore consider whether a nominee to a regulatory commission is in sympathy with the objectives of the laws which he will be called upon to administer, and whether he will support policies agreeable to the majority of the Senate.

The contest over the confirmation of David E. Lilienthal as chairman of the Atomic Energy Commission, in 1947, is regarded by one

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83. Haynes, supra note 9, at 76.
84. Hyman, supra note 19, at 28.
85. Harris, supra note 16, at 178.
student of the appointment process "as one of the most notable cases in the history of the Senate."86 John W. Bricker, the only member of the Atomic Energy Committee to vote against confirmation of Lilienthal, spoke of the co-equal responsibility of the Senate in selecting a man for the Atomic Energy Commission, maintaining that the Commission "is essentially an arm of the Congress, the legislative branch, and in our consent we have a responsibility rising almost to the level of the original appointing authority."87 Objections to Lilienthal in the Senate centered around the belief that he favored a constant extension of government power. Senator Cain of Washington announced that Lilienthal was "a man whose thirst for power and authority is unquenchable,"88 Senator Bridges said, "[h]e is a typical bureaucrat," with a "trappy, tricky mind," and accused Lilienthal of running the TVA "like a czar."89 Senator Wallace White of Maine also charged Lilienthal with "dictatorial management" of the TVA.90 Another objection was that Lilienthal was "soft" on issues connected with Communism. Senator Ferguson, speaking in opposition to Lilienthal's appointment, stated that he had been too lenient with Communists employed by the TVA and believed in "socialist aristocracy."91 Senator McKeller of Tennessee attacked Lilienthal on the grounds of having appointed three Communists to the AEC during his recess appointment (though Senator Knowland emphasized that there was no evidence in the record to substantiate that allegation).92 "With thousands of able men from whom to choose," Senator Byrd asked, "why should a selection have been made that has even a taint of some foreign 'ism' abhorrent to the American people?"93 And Senator Taft stated that the confirmation of Lilenthal's appointment would represent "a real threat to our national safety."94 Nevertheless, Lil-

86. Id. at 168.
87. Id. at 165.
88. 93 Cong. Rec. 2860 (1947), as cited in Harris, supra note 16, at 165.
89. 93 Cong. Rec. 2952-56 (1947), as cited in Harris, supra note 16, at 166.
90. N.Y. Times, Feb. 14, 1947, at 1, col. 4, as cited in Harris, supra note 16, at 163.
91. 93 Cong. Rec. 2595 (1947), as cited in Harris, supra note 16, at 165.
92. Harris, supra note 16, at 166.
94. Harris, supra note 16, at 164 n.21.
ienthal was vindicated by a strong speech delivered by Senator Vandenberg, who said that while he was initially prejudiced against the appointment, he could find no basis, after weeks of testimony, for the charge that Lilienthal was sympathetic to Communism, and was led by evidence "and a just regard to urgent public welfare . . . to recommend Mr. Lilienthal's confirmation. . . ." The Senate confirmed Lilienthal by a vote of 50 to 31, though he would probably have been rejected were it not for Vandenberg's influence.

The Senate's searching inquiries into the political philosophy and economic background of nominees has resulted in the rejection of the recent appointment of Robert Morris to the Federal Power Commission. However, the significance of this defeat pales somewhat when one considers that it was only after a long string of victories for the President—largely won by default. There has always been a tradition for Presidents to try to shape regulatory agencies to accord with their own objectives, but the Nixon Administration has had far more success in achieving this goal than any administration in recent history. Considerable controversy surrounded the nomination of Lee R. West, a little known state district court judge of Ada, Oklahoma, to head the Civil Aeronautics Board. Members of the Senate had hoped for the re-appointment of Robert T. Murphy, whose twelve-year term expired on January 1, 1974. At the urging of American Airlines with home offices near Ada, Oklahoma, the administration sought to replace Murphy because of his votes in favor of increased competition, against mergers, and in favor of consumers.

95. 93 CONG. REC. 3108 (1947). See also HARRIS, supra note 16, at 167.
96. 93 CONG. REC. 3241 (1947). See also HARRIS, supra note 16, at 168-69.
97. 119 CONG. REC. S11094-11110 (daily ed. June 13, 1973). The debate and vote on Robert Morris is an interesting study in the conflicting opinions of members of the Senate as to the appropriate role for the legislative branch in the appointment process. Many members sought to convince their colleagues that the same deference to presidential choice as exists with cabinet posts should prevail with respect to regulatory agencies. However, lead by Senators Magnuson, Moss, and Hart, those who opposed this concept won out. They pointed to the fact that Morris had worked for a law firm retained by Standard Oil for fifteen years. The specter of the regulator and the regulated becoming one convinced the majority to demand from the President that he appoint someone more representative of the consumer's point of view. Morris' nomination was defeated by a vote to recommit to committee, 49-44.
To protect the agency from too much control from any one administration, Congress generally vests agency members with long terms, staggering the end dates and requiring bi-partisan membership. Professor Kenneth Culp Davis, one of the leading observers of the administrative process, said in a recent interview that little difference remains between "independent" regulatory agencies and administrative departments. "Congress still prefers independence and the President still prefers to have subordinates. . . . The reality is not that different. The difference is much less than people expect."

One tradition that has undercut the staggered term scheme is the notion that chairmen serve at the pleasure of the President. Resignations have also contributed to a decay of the legislative safeguards. The result has been that within the first four and one-half years of his administration, President Nixon has named twenty-eight of the thirty-six posts on the six major regulatory bodies and has named all six chairmen. An illustration of how little effect the safeguard of bi-partisanship has is the case of Alfred T. McFarland who was named to the Interstate Commerce Commission. He was nominally a Democrat. However, severe Senate criticism was voiced since McFarland had a history of supporting Republican candidates. The White House withdrew the nomination, had McFarland change his registration to Independent and resubmitted his name. Senator Frank Moss said "[w]e could do nothing but confirm him. . . . I don't like it, but I couldn't help but have some admiration for the bold way they did it."

The most recent blow to the "independence" of independent regulatory commissions was the decision by the Office of Management

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99. The Supreme Court has sustained the constitutionality of Congress circumscribing the President's removal power in the case of regulatory agencies. Humphrey's Executor v. United States, 295 U.S. 602 (1935). This notion was expanded one step further in the case of Weiner v. United States, 357 U.S. 349 (1958). In Humphrey's Executor, the Court ruled that Congress may legislatively restrict removal in instances where a quasi-judicial officer is involved; but in Weiner, where the law was silent on the tenure and removal procedure, a member of the War Claims Board was held to have been unlawfully discharged since the office was not part of the executive branch, but rather intended to be independent. The essence of Humphrey's Executor, said the Court, was the nature of the office and not the fact that the legislature had provided for a specified term or a specified removal procedure.

100. N.Y. Times, supra note 98.

101. Id.
and Budget to include certain regulatory agencies within administration-wide expenditure and personnel cuts. Senator Edward J. Gurney termed this "sort of a new and far-reaching authority that either did not exist or was not used before. ..."  

The question then becomes what is the Senate's proper role in the face of such overwhelming tendencies toward absorption of regulatory agencies. The answer is, simply, that Congress must defend its constitutionally granted powers jealously. It must look to itself to reverse the atrophying prerogatives it once had. In short, it must reassume its rightful role as partner in the appointment process.  

The Judiciary

What was said of the Senate's attitude toward making a more thorough investigation of a nominee for a seat on a regulatory agency than when a cabinet office or ambassadorship is at stake is even more compelling in the case of judicial nominations. While Charles Black sees "a clear structural reason for a Senator's letting the President have pretty much anybody he wants" in executive department posts because they "are his people," he explains that "just the reverse is true of the judiciary. The judges are not the President's people. God forbid! ... They are as independent of him as they are of the Senate ...." During the debate on the Carswell nomination, Senator Frank Church expressed a similar opinion:

Surely, the reasons why the Senate customarily applies a lenient standard to Executive appointments, giving the President so much latitude in the selection of his own official family, are utterly lacking in relevance when applied to the Supreme Court of the United States. Under our Constitution, the Supreme Court, highest tribunal in the land, presides over an independent judiciary, separate and apart from the legislative and executive branches of the Federal Government.

The separation of the judicial power from the other two branches of Government was a sound principle established by the founder of the Constitution and incorporated into every state constitution. An independent and impartial judiciary is a basic concept of civilized gov-

102. See Harris, supra note 16, at 178; Hyman, supra note 19, at 28.
103. Berman, supra note 8, at 363-64.
104. Black, supra note 10, at 660.
government, and is essential to assure the administration of equal justice under the law. A court whose decisions would be exactly what a President demanded would be neither just nor impartial. The independence of the judiciary is unique, but then the American Constitution is unique—a written constitution definitely limiting the powers of Government as they have not been limited in other countries.

Objections to individuals nominated by the President for membership on the Supreme Court are usually made on the basis of fitness for office, and the judicial philosophy of the nominees. The philosophy of a Supreme Court nominee, in the view of Black, is a factor in his fitness:

If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.¹⁰⁶

President Wilson's nomination of Louis D. Brandeis to the Supreme Court brought about one of the most celebrated Senatorial confirmation contests in history. No Supreme Court nominee—save Judges Haynesworth and Carswell—has ever met with a stronger or more determined opposition to his appointment.¹⁰⁷ A large segment of the bar thought Brandeis extreme and attempted to block his confirmation.¹⁰⁸ It was feared that Brandeis, considered by his opponents as an objectionable radical, a muckraking crusader, and a socialist, would affect the generally conservative nature of the Court.¹⁰⁹ While Brandeis had high ideals and great tenacity of purpose, a memorial signed by Elihu Root and three other past presidents of the American Bar Committee stated that "taking into view the reputation, character, and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States."¹¹⁰

The Brandeis confirmation hearings held by the Judiciary Subcommittee were quite extensive, covering a period of four months. The

¹⁰⁶ Black, supra note 10, at 663-64.
¹⁰⁷ Harris, supra note 16, at 99.
¹⁰⁸ 116 Cong. Rec. 17511, citing Commager, Choosing Supreme Court Judges, 162 New Republic 13 (May 2, 1970) [hereinafter cited as Commager].
¹⁰⁹ Harris, supra note 16, at 100-01, 113.
¹¹⁰ Hearings on the Nomination of Louis D. Brandeis before the Subcommittee of the Senate Committee on Judiciary, 64th Cong., 1st Sess., S. Doc. 409 pt. 1, 1226 (1916).
hearings were twice re-opened, and the proceedings filled two thick volumes of more than 15,000 printed pages. In the contest over Brandeis, the administration tried to avoid stressing his progressive record or creating an impression of excessive Jewish and labor support. Finally the Committee voted 10 to 8 in favor of Brandeis' confirmation, May 24, 1916. The appointment came to a vote in the Senate on June 1, and Brandeis was confirmed, 47 to 22. Every Republican Senator and one Democrat, Senator Newlands of Nevada, voted against Brandeis. Mr. Newlands explained his vote, as follows: "I have great admiration for Mr. Brandeis as a propagandist and publicist, but I do not regard him as a man of judicial temperament..." However, after Brandeis was on the bench, even those who disagreed with him on social and economic issues came to regard him as an able and valued member of the Court, whose social and economic insights represented a unique contribution to the life of the Court.

When one comes to the matter of Judge Haynesworth or Judge Carswell, the nomination of either man would have materially changed the recent liberal character of the Supreme Court to a more conservative, though not unduly conservative, Court. President Nixon announced that he would not appoint any judge to the Court who held extreme liberal views. The President had "set about to reshape the Supreme Court," stated Senator Gurney of Florida, in order to "restore to the High Court the dignity and objectivity that once marked its deliberations and by doing so restore it to the esteem it once enjoyed with the American people." Nonetheless, the mistake of Mr. Nixon, particularly in the case of Carswell, lies in the fact that he approached the situation from the wrong angle. In a letter, dated March 31, 1970, to Senator William Saxbe, the President wrote in regard to the confirmation of Judge Carswell:

What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members to the Court—and whether

111. HARRIS, supra note 16, at 113.
112. 53 CONG. REC. 9032 (1916).
113. HARRIS, supra note 16, at 113.
114. 64 CONG. REC. 9032 (1916).
this responsibility can be frustrated by those who wish to substitute their
own philosophy or their own subjective judgment for that of the one per-
son entrusted by the Constitution with the power of appointment. The
question arises whether I, as President of the United States, shall be ac-
corded the same right of choice in naming Supreme Court Justices which
has been freely accorded to my predecessors of both parties.

. . . .

The fact remains, under the Constitution it is the duty of the President to
appoint and of the Senate to advise and consent. But if the Senate at-
ttempts to substitute its judgment as to who should be appointed, the tra-
ditional constitutional balance is in jeopardy and the duty of the President
under the Constitution impaired.117

Senator Brooke responded to President Nixon's contention by
pointing out in the Senate chamber, "[w]e must never view the
nomination and confirmation process, as the Constitution has pre-
scribed, as anything less than a joint responsibility, and one which
we must take most seriously . . . . Separation of powers does not
mean the domination of one branch over another, but rather—in
this case in particular—a shared, co-equal responsibility."118

It appears that at the time the votes were taken on the nomina-
tions of Clement F. Haynesworth and G. Harrold Carswell more
Senators concurred with Senator Brooke in his insistence on Sen-
tatorial responsibility in the confirmation process. The nomination of
Judge Haynesworth was criticized by opponents, including labor and
civil rights organizations, due to his conservative Southern back-
ground, and the allegation that the Judge had violated existing ethi-
cal standards in several corporate cases before him in which he had
a "substantial interest."119 The Haynesworth appointment was
voted down with 45 Senators voting for confirmation and 55 voting
against.120 In the case of Judge G. Harrold Carswell, President
Nixon's nominee was attacked as being mediocre, racially biased, and
lacking in candor.121 The New York Times, commenting on Judge
Carswell's opinions, noted that he "finds few controversies that
cannot be settled by invoking some settled precedent"—though, as
Senator Gurney suggested, this was much more "a highly lauda-

118. Id. at 10160.
120. 115 CONG. REC. 35396 (1969).
121. Editorial, Judge Carswell: The President's "Right of Choice," Wash. Post,
April 2, 1970.
tor statement" than the "damning criticism" it was intended to be.122 The votes on the successful effort to recommit the Carswell nomination split much more closely along party lines.128

Following the Haynesworth and Carswell defeats, President Nixon successfully nominated Harry A. Blackmun (confirmed 94-0, May 12, 1970),124 Lewis F. Powell (confirmed 89-1, Dec. 6, 1971)125 and William H. Rehnquist (confirmed 68-26, Dec. 10, 1971).126 The only significant resistance posed was to Rehnquist. Liberal Senators Birch Bayh, Philip A. Hart, Edward Kennedy and John V. Tunney filed separate opinions in the Judiciary Committee's report due to reservations about Rehnquist's opinions on civil liberties and particularly his views on wiretapping.127 On December 8th, Senate Minority Leader Hugh Scott filed a cloture petition to shut off debate which failed by a vote of 52 to 42. On December 10th, Birch Bayh moved to postpone consideration of the nomination until January 18th, 1972. The vote on the motion defeated it 70 to 22. The opponents, conceding defeat, yielded the floor and the final confirmation vote was allowed to proceed.128

The deplorable practice had developed whereby the Senate confirmed any presidential appointment to the Supreme Court unless the nominee was found to be a thief or felon, or involved in a serious scandal. For a number of years members of the Senate—in many instances because a majority of them usually stood with the President's party—approached appointments from the point of view that unless it could be proven that a nominee was clearly incapable of performing the duties of the office to which he was appointed, he should be confirmed. George Galloway describes how, during the early days of the Republic, nominations were approved on the same day they were received; but today, when a unanimous consent order is required to act upon a nomination on the very same day it is reported out of committee, delay for greater deliberation should be the norm in the Senate.129 Writing in Prospectus, Senator

123. 28 CONG. Q. 903 (1970).
125. 29 CONG. Q. 2531-32 (1971).
126. Id.
127. Id.
128. Id.
Robert Griffin completely dismisses the idea that since the Senate has not used its power of advice and consent it is almost a "rubber stamp." The Senator recognizes that "the power of any President to nominate constitutes only one half of the appointing process," and the "other half . . . lies within the jurisdiction of the Senate. . . ." Thus, "[t]o assure the independence of the judiciary as a co-ordinate branch," Griffin reasons, ". . . it is important to recognize that this power of the Senate with respect to the judiciary is not only real, but it is at least as important as the power of the President to nominate."\(^{130}\)

Certainly, one of the fundamental foundations of a democracy is the high quality of its courts. Henry Steele Commager cites numerous qualifications for a judge on the Supreme Court: legal erudition, courage and independence, broad and generous social sympathies, resourcefulness and imagination, and the ability to be a great teacher of the law, politics, constitutionalism and philosophy. But Commager allows that the most important quality is judicial temperament—"the ability to judge issues dispassionately and impersonally."\(^{131}\) Yet it is quite clear that the Court is an integral part of the law making process. Therefore, it is not at all improper to measure the nominee's qualifications by the Senate's view of the Constitution and the Bill of Rights. The Senate is not supplanting the President's role in the appointive process—for truly it is a shared responsibility. Passivity in the review of presidential nominees has no place in the American constitutional scheme.

CONCLUSION

The appointment of officers of the United States is an Executive function in which the Senate participates in an advise and consent capacity pursuant to the mandate of article II, section 2, of the Constitution. While the Senate's constitutional responsibility in the appointment process may not be equal to that of the President, it is of the same character, in that both the Senate and the President must thoroughly investigate and evaluate nominees in order to fulfill their respective constitutional duties.


The proposition that the Senate may not reject a nominee unless he is a felon or is shown to have engaged in gross misconduct, constitutes a total misconception of the Senate’s constitutional role in the appointment process. The Senate has the duty under article II, section 2, to pass on a nominee’s character, ability and general competence and to confirm only those nominees found to be qualified to assume the position for which they are nominated. Each case must be decided on its own merits and be discussed and debated in the Senate.

There is a slight presumption in favor of confirmation of the President’s nominees, but this does not alter the Senate’s duty to make its own complete investigation and evaluation. Because Senatorial resources are limited, it may be necessary for the Congress to legislate a reduction in the number of positions subject to advice and consent so that the Senate may give more complete scrutiny to those positions regarded as most important. This reduction would ensure that positions as important as Director of the Office of Management and Budget would not escape close scrutiny.

The strength of presumption in favor of a President’s appointments should be viewed conceptually as a continuum, with the presumption increasing in strength as one moves along the continuum from judicial appointees, through members of independent agencies, to foreign envoys, and finally to cabinet and other executive officers. The Senate’s role in the appointment process increases as the strength of presumption in favor of presidential nominees decreases.

There is a saying that a President is known by the appointments he makes. George Haynes has asked, “[m]ay [not] a Senate be known by the appointments it prevents?” The majority of the Senate has too readily confirmed executive appointments in the absence of outstanding factors which disqualify the nominee. If a President makes poor appointments and the majority of the Senate confirms them, then just as the President and the Senate share constitutional responsibility in the appointment process, they must jointly share responsibility for the quality of government this nation will have.

132. Haynes, supra note 9, at 753.